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416605—57

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 682

CHARLES EDWARD WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 837–847; Pet. 7–17) is reported at 238 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals (R. 848; Pet. 6) was entered on November 6, 1956. A petition for rehearing (R. 849–851) was denied on December 7, 1956. The petition for a writ of certiorari was filed on January 7, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

A jury found petitioner guilty on a charge of conspiracy to defraud the United States and to violate seven named sections of the revenue laws, six of which, as substantive violations, would have been punishable as felonies. Petitioner requested no clarification of the verdict. The question is whether the court correctly imposed sentence for conspiracy to commit a felony where the evidence made petitioner the central figure of the conspiracy and was irreconcilable with a theory of conspiracy to violate only the section punishable as a misdemeanor.

STATUTES INVOLVED

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 U. S. C. 2803, 2810, 2833, 2834, 3115, 3116, 3253, 3321 provided in pertinent part:

> § 2803. * * *
>
> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the im-

mediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *

* * * * *

(g) * * * Any person who violates any provision of this section * * * shall * * * be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

§ 2810. * * *

Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

§ 2833. * * *

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

§ 2834. * * *

No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *

§ 3115. * * *

Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this part and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this part or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. * * *

§ 3116. * * *

It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. * * *

§ 3253. * * *

Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills

or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States.

§ 3321. * * *

Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both.

* * * * *

STATEMENT

In the United States District Court for the Northern District of Georgia petitioner, in company with several others, was indicted (R. 2–8) under the provisions of the Internal Revenue Code of 1939 for the substantive crimes of knowing possession and control of an unregistered still, 26 U. S. C. 2810 (count two), and engaging in the business of a distiller with intent to defraud the United States of its revenue, 26 U. S. C. 2833 (count three). Count one charged a conspiracy to defraud the United States of its liquor revenues through a scheme (a) to possess an unregistered still, 26 U. S. C. 2810; (b) to engage in the

business of distilling liquors with intent to defraud the United States of the tax imposed on liquors, 26 U. S. C. 2833; (c) to make and ferment mash for production of distilled spirits on premises other than an authorized distillery, 26 U. S. C. 2834; (d) to remove, deposit and conceal distilled spirits on which a United States tax was unpaid with intent to defraud the United States of such tax, 26 U. S. C. 3321; (e) to transport, possess, sell and transfer distilled spirits in containers lacking the required federal stamps evidencing quantity and payment of tax, 26 U. S. C. 2803; (f) knowingly to possess property intended for use in the manufacture and production of nontax paid distilled spirits, 26 U. S. C. 3115, 3116; and (g) to carry on the business of a wholesale and retail liquor dealer without paying the special tax, 26 U. S. C. 3253. All of the alleged objects of the conspiracy save "f" were punishable as felonies if charged as substantive crimes. Twenty-one overt acts were alleged during the conspiracy from August 1, 1953, to the date of the indictment, October 19, 1954. The jury was instructed that "[i]t is not necessary * * * that the Government should prove all of these overt acts, or all of these alleged purposes of the alleged conspiracy" (R. 803; Pet. 9), and that proof of a conspiracy to "violate any one or more of the provisions of law enumerated [in the indictment]" would sustain a verdict of guilty (R. 813–814; Pet. 9–10). No relevant requests to charge were made nor was any exception taken to the charge (R. 819–822; Pet. 10). The jury returned a verdict of guilty on the conspiracy

count, not guilty on the charge of possession and control of an unregistered still,[1] and no verdict as to count three which charged the carrying on of the business of distiller with intent to defraud the United States of the tax imposed on the spirits distilled. Petitioner did not seek clarification of the jury's verdict of "Guilty On Count One" (R. 828). The trial judge sentenced him to three years' imprisonment and fined him five thousand dollars (R. 830). The Court of Appeals affirmed (Pet. 7–17; R. 837–847).

Petitioner's claim that the jury may have intended to find him guilty of conspiracy to commit only the misdemeanor requires a brief summary of the evidence:

The chief government witness was one Logan, a fellow conspirator, who reported the liquor operation to the federal authorities after a dispute with petitioner (R. 113, 114). His account, corroborated by testimony of the revenue officers, included the following:

In August 1953, on release from jail after serving a "whisky sentence" (R. 33), Logan went to live at the home of his sister, petitioner's wife (R. 34). He soon commenced hauling whisky for petitioner (R. 34), and for two months made three or four trips a week hauling liquor from Dawsonville, Georgia, to Atlanta (R. 34). The truck used held approximately 500 gallons in gallon cans (R. 36). In Atlanta, Logan

[1] The trial judge had directed such a finding on this count as to all defendants because the government failed to show that there was no sign posted on the still showing that it was registered (R. 814, 819).

with others "set off" the whiskey at various customers, putting the excess in a "stash" at a garage (R. 38). He handled no money either in Dawsonville or from customers in Atlanta (R. 39–40). He received a salary of $100 a week from petitioner (R. 40). In November 1953 petitioner rented a dwelling house and chicken house near Canton, Georgia, and put up a still there (R. 41, 51). Logan helped move in the still, hauled in the whisky ingredients and hauled out the product to a second "stash" on Vinings Road (R. 42). Petitioner supervised alteration of the Vinings Road building to make it suitable for concealment of whisky (R. 63). Petitioner later rented an abandoned streetcar located on private property off a highway and placed a trailer there beside it, in which Logan lived. Logan testified that he hauled a hundred sacks of sugar at a time to the still, each weighing a hundred pounds; that he had bought the sugar on credit at petitioner's direction at a place near Cumming, Georgia (R. 46). When word of a forthcoming raid was received, petitioner with others went to the chicken house still, poured out approximately 5,000 gallons of mash and hauled the barrels into the woods. Logan later saw equipment from the still at petitioner's garage. (R. 57–58.)

In hauling materials and deliveries of liquor Logan used trucks furnished by petitioner (R. 49, 50). He described an oil tank truck specially constructed to camouflage its use for carrying whisky (R. 68–73), owned by petitioner and outfitted at petitioner's direction (R. 73, 74). Petitioner personally convoyed

truck loads of liquor acting as a lookout to spot any law enforcement officers who might be waiting in its path (R. 76, 77). Logan witnessed one payment by petitioner to a codefendant, Tatum, of $8,000, and Tatum came to the house for payment weekly (R. 78–80). Logan hauled raw materials to bootleggers in other states, exchanging it sometimes for loads of whisky (R. 82–88).

ARGUMENT

Petitioner argues that, since one of the seven alleged objects of the conspiracy was to commit a misdemeanor, he should have received only a 30 days' sentence on the theory that the jury might have found him guilty only of conspiracy to commit the misdemeanor. In relation to the evidence in this case, this contention is devoid of substance. Petitioner conceded below (Pet. 7–8) and does not now question that there was substantial evidence from which the jury could have found him guilty of a conspiracy to violate each of the seven sections alleged in the indictment. Indeed, there was no evidence of a scheme merely to possess materials intended for use in the manufacture of non-tax paid distilled spirits—the misdemeanor offense. If the jury credited the evidence at all, it necessarily had to find a conspiracy to defraud the United States by engaging in wholesale illegal traffic in liquor, including manufacture, transportation, concealment and distribution, with the possession of materials as an incidental part of the operation. All these facets of the business and the intent to defraud the United States were charged in the one count as ob-

jects of the conspiracy. A conspiracy to defraud the United States is a felony (18 U. S. C. 371, *supra*, p. 2), and each of the aforementioned steps in the scheme, other than possession, is in its substantive aspect a felony. Hence the conspiracy which the jury found that petitioner had joined (and of which the evidence showed him to be the central figure) was necessarily a conspiracy to commit a felony, for which the three-year sentence could properly be imposed.

In *Shibley* v. *United States*, 237 F. 2d 327 (C. A. 9), certiorari denied, 352 U. S. 873, three counts of the indictment charged that defendant: (1) aided and abetted the commission of burglary (a felony); (2) received, concealed, and converted property of the United States, knowing it to have been stolen; and (3) conspired to commit burglary and receive stolen government property. The jury returned no verdict on the substantive count of aiding and abetting the burglary and found, with respect to the second substantive charge, that the defendant was guilty and that the value of the property was less than $100. Under this last finding the charge was reduced to a misdemeanor. 18 U. S. C. 641. The jury also found the defendant guilty on the conspiracy count, and the trial judge imposed sentence thereon as for a felony. In upholding this sentence, the court reasoned that the jury could have found that the defendant participated in a conspiracy to commit the felony of burglary, even though he did not participate in the actual offense to a degree which would make him an aider and abettor of the substantive crime. The holding in *Shibley*

supports *a fortiori* the government's position here, for, as we have shown, in this case the conspiracy proven inevitably included agreement to commit felonies and the misdemeanor was only an incidental part thereof. See also *United States* v. *Wiesner*, 216 F. 2d 739, 742 (C. A. 2), where the indictment charged a conspiracy to commit a non-criminal offense and to defraud the United States. In *Wiesner* the same evidence went to both branches of the charge and the court held that a single verdict of guilty was properly to be taken as including a finding of a conspiracy to defraud.

Moreover, as the Court of Appeals correctly notes (Pet. 14–16), even if petitioner's contention had substance, the only relief to which he would be entitled would be a new trial. The possibility that the verdict could have been based only on the conspiracy to commit the misdemeanor did not require the court below to assume that this was the fact and to ignore the far greater probability that the conviction was based on a conspiracy to commit a felony. At most, if the verdict were too uncertain, there would have to be a new and clearer verdict. But petitioner, who sought no clarification of the verdict at the trial, disclaimed in the Court of Appeals any desire for a new trial (Pet. 16) and does not now seek that relief (Pet. 35). Having chosen to rest on the evidence and the verdict in this case, he is in no position to complain because the court imposed sentence on the basis of what the evidence clearly established, a conspiracy to commit a felony.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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